COMMITTEE ON RULES OF PROCEDURE
IN DOMESTIC RELATIONS CASES

Monday, February 9, 2004 10:00 am – 3:00 pm
Judicial Education Center
541 E. Van Buren, Suite B4
Teleconference #: (602) 542-9007
Web Site: http://www.supreme.state.az.us/drrc/

Members Present:
Hon. Mark Armstrong, Chair
Annette T. Burns, Esq.
Hon. Norm Davis
Deborah Fine, Esq. (telephonic)
Bridget Humphrey, Esq.
Phil Knox, Esq.
Janet Metcalf, Esq.
Hon. John Nelson
Hon. Dale Nielson
Robert Schwartz, Esq.
Debra Tanner, Esq.
Hon. Nanette Warner (telephonic)

Members Not Present:
Annette Everlove, Esq.
Richard Scholz, Esq.
Brian Yee, Ph.D.

Staff Present:
Konnie K. Young, Esq.
Karen Kretschman, Esq.
Isabel Gillett

Members Represented by Proxy:
Laura Thomas for Hon. Michael Jeanes

Quorum:
Yes

1. Call to Order: Hon. Mark Armstrong

After welcoming Committee members, Judge Armstrong spoke to the members about House Bill 1810, which is a bill that would entitle the legislature to enact procedural rules and laws which would leave the court rules open to legislative changes and initiative procedures.

The members introduced themselves. There was a motion to approve the minutes.

Motion: Minutes Approved.
Seconded
Vote: Minutes Approved.

2. Reports from First Workgroups: Sections I, II, III, and XI

a. Workgroup 1 – Sections I and II (Bridget Humphrey, Chair)

Bridget provided a memo to the members regarding her workgroup's changes. She referred the group to Judge Warner's memo which covered the Attorney General's request for a modification of ARCP Rule 17(g) to allow minors to be sued on paternity and child support matters without the appointment of a *guardian ad litem*. Judge Warner stated that she strongly objected to this modification.

Bridget stated that her workgroup had mostly cleaned up language since the last meeting. She said they spoke about rewriting Rule 19, but they did not get to make any changes on that. Bridget said that in the packet was a draft of Notice of Limited Appearance that she had submitted at the last meeting, trying to incorporate as many types of proceedings as possible. She stated that she would rather use the simple form and leave it to the attorney to craft language as far as what limited scope is. She said that most states use the simplified format. Judge Armstrong stated that for the time being it is best to have one that is framed in this manner because it is easier to eliminate language than to add later. One member asked if it might be appropriate to have a place for the client to sign this form stating that they agreed with it. Judge Armstrong said he had no problem having the client's approval on a document that is filed with the Court.

TASK: Judge Armstrong and Konnie will incorporate Bridget's group's changes.

b. Workgroup 2 – Section XI (Hon. Norm Davis, Chair)

Judge Davis said that the goal of his group was to distill everything that they had done and get it as close to final as they could. He stated that they had a number of documents that made it a little convoluted. He submitted a document "Rules of Family Law Procedure" in strikeout form which was cleaned up from last meeting. Many changes in this document are minor.

Rule 42(f)

In regard to Rule 42(f), Change of Judge, Judge Davis thought it might be better to refer to Rule 42(f) for the civil rules and piggy back on top of all of the case law, rather than start the divergence of our own rule.

Discussion ensued as to whether the case law applies to this rule, and whether making amendments to it might drive courts further and further apart, on a simple procedure that has worked well for years. Judge Davis does not see much of a reason to have a separate rule that is different from the civil rule. He believes that all it needs is to add to Rule 5: "Notices and requests for a change of judge shall be made in accordance with Rule 42(f), Arizona Rules of Civil Procedure."

Judge Armstrong stated that he had no problem with that, as long as we do not just reference *ARCP* too often, and we should minimize the need to flip back and forth between *ARCP* and *Family Court Rules*. Bob Schwartz agreed with Judge Davis, that we should just leave it alone. Judge Nelson asked if in doing this would we be accomplishing what we want to do. He believes that *pro per* parties might read this and wonder where to find 42(f). One member suggested that it could be put in an appendix. Judge Davis doubts that anyone has looked at the rule in the way they fill out the self-service form. He said that eventually Maricopa County will be handling this electronically where they will push a button and the rule will pop up. However, the smaller counties will not have that capability. Judge Armstrong said he was in favor of going with Judge Davis' recommendation.

The Protected Unpublished Address Rule

Judge Davis said his group had cleaned up the protected unpublished address rule. He stated that there was one divergence on Rule 4(c), duplicate petitions. Annette had submitted a memo regarding this. He stated that he would rather the cases be consolidated before that rule kicks in. He asked, "If you have two people who file separately, and the cases are never consolidated, does that relieve them of the responsibility of responding to the other's case?" He feels that we should have the competing petition act as a response automatically if the two cases are actually consolidated by court order. No one had a problem with this.

Other Rule Changes and Definitions

Judge Davis stated that the other rule changes would be best seen when they cleaned them up. He also thought that they should just start numbering the rules and cut out the .1 and .2, etc. He suggested that Konnie do this. He also said that they had started a definition listof basic words. He thought we had a baseline rule on "petition." He said if it was labeled a petition, that it would be an initial petition to start a case or start a post-decree matter. A motion would be anything between a petition or an order, or anything that was asking for relief after the motion. It could be post-decree or post-order.

Janet suggested we still need a definition of an applicant for step-parent petitions or grandparent petitions. Judge Davis said it can get pretty confusing, so perhaps they need to flesh that out. Judge Davis said that they would start collecting definitions, and Judge Armstrong agreed.

c. Workgroup #3: Section III (Annette Burns, Chair)

Annette said that their work was on Rules 54 and 55. Rule 55 is the default rule. She explained that in 55(b), judgment by default, "by motion" should be #1, and then there would be some sub-headings; "by hearing" would be #2. This essentially stays the same as the old Rule 55(b)(2), with the exception that in the second paragraph under "by hearing"; they added the sentence, "For purposes of this section, appearance includes the party's personal appearance."

The next paragraph is also from the old Rule 55(b). The next paragraph that starts "The defaulted party is in the position" is new; the next two paragraphs are new. The rest of Rule 55 is the same as it was in Rules of Civil Procedure.

Rule 55(d)

One member suggested that 55(d) needed to be conformed to the new definition. Annette said they would do that. Janet asked if the word "damages" should be changed, and it was suggested to change it to "relief sought by petitioner." This was acceptable to the Committee. One member asked if "full scale" was the proper term. It was changed to "hearing." Another member asked about "full participation," and that was changed to "participation."

Default

There was some discussion regarding default. Judge Armstrong asked if the Committee wanted to edit Rule 55(d) to broaden the categories so that we can enter default without a hearing. As it stands now, it is limited. Judge Warner said she would not want to broaden anything involving children. However, increasing property would be acceptable. Annette suggested we could delete (b) regarding real property. Annette mentioned removing monetary categories, and Judge Armstrong said he was in favor of deleting them, which would simplify the rule, and would not require a hearing. Annette suggested that we would be leaving in (a) as it is written, leaving in (c), and deleting (b), (d), and (e) of Rule 55(b)(1).

Judge Davis suggested that judges pick up a lot by listening to people. He stated that he does not like the conception of decree by mail, and that we could add statements that list property and approximate value, or at least have the parties avow that it is equitably (equally) divided.

Disclosure Requirements

Judge Nelson stated that California and Florida have extensive disclosure requirements. They also require a financial disclosure before a default can be entered. He thought this might be something to discuss in connection with Rule 26.1. There was more discussion on this subject. Judge Armstrong suggested we eliminate these three categories, put a note in here for future reference, and defer the decision whether to require some additional financial disclosure.

Consent Decree of Dissolution of Marriage

Annette discussed Rule 54(g) which deals with the consent decree for dissolution of marriage. This incorporates Maricopa County's local rule 6.6. It finalizes divorce with the parties' agreement, but without an appearance in court, in order to eliminate appearances at default hearings or trials. Bob asked if there should be a form or a stipulation attached that says the form attached is exhibit A. Annette agreed. A reference would be made to that. There was some discussion regarding the child support order. Bob suggested that in the original decree, when children are involved and there is a deviation, then there needs to be a statement reflecting why it is in the best interests of the children. Judge Armstrong asked Annette to add this.

> **TASK: Annette will add a statement regarding why it is in the best interests of the children.**

There was a question asked about separate orders and various requirements – health insurance, tax dependency situation, and deviation. Annette asked if at some point the Committee is going to have all of those requirements in a Decree section. Judge Armstrong asked if the Committee was in agreement to add Bob's language regarding deviations, and it was agreed upon.

Judge Davis raised the issue of doing one document - a Consent Decree. Judge Armstrong suggested that all the things that are in the stipulation could be included in the decree, and it would be signed by the parties, and they could require verification or notification, whatever level they decide upon.

Domestic Violence Statement

Annette brought up the subject of the Domestic Violence statement, and that it has always been a sticking point in the consent decrees that she has done. One member asked why we need it, and Annette responded that it is because of the statute. Judge Armstrong said that the argument for having it is that the parties are getting together outside of the court, and they may not have equal bargaining power because of domestic violence, and this brings it to their attention, that there is this requirement. He agreed that it probably is not considered a requirement by law that we include this. He believes that we do need to consider the public policy involved of not including it, and recognize that the parties are not in equal bargaining positions when they agree to this outside of court, and the judge never sees either of them. It was agreed to include it.

Annette reiterated that we would make the stipulations into being part of the consent decree, there would just be one section, and she will include what Bob added to (b) regarding when children are involved, that there must be findings.

Specific Requirements for the Decree

Discussion ensued regarding notary public language. The result was that the language would be: "Subscribed and sworn (or affirmed) before a notary public." They would also reference the form in the appendix.

Annette said that she was not sure what all requirements should be listed in a decree. She asked if we could call it a decree and rely on the statutes to define what a decree is. Judge Davis said that all we need to say is, "in addition to the other requirements of law, the Consent Decree shall contain the following."

Judge Davis also stated that we do not need a separate parenting plan, because this can also be in the Decree. It was decided to just eliminate "separate." Judge Davis also asked why does the worksheet need to be signed? He stated that if the amount in the Decree is agreed to and is supported by the worksheet, there was no need for the worksheet to be signed. This would keep the form on one page. There was some discussion as to why we were making this so complicated. Judge Armstrong suggested that we change it, so that there would be one document, and leave the specific requirements in but not add any more.

Judge Warner raised an issue on 55(f), which talks about judgment when service is made by publication. She asked if there would be any reason to put in this rule what can be included in a Decree when you do a judgment by publication, such as that this cannot include child custody, etc. She stated that sometimes *pro pers* think they can get anything they want in their Petitions when they are served by publication.

Keeping of the Record

At this point, Judge Armstrong stated that he needed to raise another issue, which was to eliminate the requirement that a transcript be filed as part of the record. Annette stated that her group had made a change in Rule 55(f) which stated "to put a transcript of the proceedings in a form approved by the court." Judge Davis suggested that we just say "that a record be kept." Annette said she would change the last part to read "that a record of proceedings in a form approved by the court shall be taken and transcribed if ordered by the court." There was more discussion, and Judge Armstrong concluded that we would use language borrowed from the UCCJEA.

Judge Armstrong returned to Judge Warner's original question. The consensus was to handle judgment by publication requirements in other ways.

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3. Bridget Humphrey's Presentation at the Judicial DR Conference

Bridget spoke about a presentation she would make to the annual AOC Domestic Relations Conference. She said she would talk a little about the progress we have made so far, and show some of the changes that had been made – relaxation of rules, limited scope and restricted access.

4. Reports from Second Workgroups: Sections IV, V, and VI

a. Workgroup IV (Judge Davis, Chair)

Judge Davis stated that the first meeting with his new workgroup was mostly an "idea" meeting on how to streamline temporary orders. They talked about two concepts on emergency petitions: 1) whether they should be incorporated into regular petitions, and the consensus was no, and 2) standard of review. They could not come up with a better standard of review than Rule 65. They did not see any major changes to emergency petitions.

Temporary Orders

They said that temporary orders were necessary to provide support, spousal maintenance and other relief during the pendancy of an action, but they are not a permanent resolution. Many times they are done without the necessary information. The workgroup came up with a few ideas.

Parties have to file to get temporary orders, and the workgroup felt it was a better process to at least require a request. If it went through with no response, it would be a default. If there is a response, they felt they should balance the time they spent hearing temporary orders against some kind of quick action. The workgroup thought if the response and responsive worksheet on child support calculated the amount of child support within 15% of what the petitioner asked for, that the two would be averaged, and an order would be cut without a hearing. The workgroup felt this was an efficient way to move a good number of cases. They also discussed the need to accommodate different judicial styles.

Emergency Petitions

Judge Armstrong raised an issue on the emergency petitions. He said that in Pima County they do not entertain emergency petitions – only petitions for TRO's. He said they were still using Rule 65 standards. He asked if there were any representatives from Pima County on this workgroup. Judge Davis said Annette Everlove was at the meeting, and Judge Armstrong said they had this covered then.

One of the members said he did not know the difference between an emergency and temporary order. Judge Davis said that people get confused, and they will take one or the other and continue on as if it is a permanent petition, which leads to confusion later regarding what authority are they operating on because there was never a permanent petition filed. Judge Davis said that the TRO makes sense. Another member said he would be in favor of just having a TRO. Judge Armstrong said it can be framed in an appropriate way. A TRO is generally to restrain someone or refrain from certain conduct, whereas an emergency petition might be asking for affirmative relief. Judge Armstrong stated that Judge Warner said that Pima County does not want to do this because Maricopa's has evolved from their Self Service Center, creating a profusion of emergency petitions because it is easy, but that most of Maricopa's emergency petitions are really not emergencies. Therefore, Pima County only uses the TRO concept. There was further discussion, and Judge Davis stated that his workgroup would structure Rule 65 into a statewide uniform practice. Judge Armstrong said he would like the workgroup to provide some rules that have time frames.

b. Workgroup V (Judge Nelson, Chair)

Rule 26

Judge Nelson stated that the workgroup proposed to strike some language and insert language under 26(a) (Discovery Methods) regarding a court designated expert that would cover areas that come up frequently in dissolution proceedings. Under 26(b), paragraph 3, the workgroup struck third-party language. Under 26(d) and (5), all is struck. Rule 26(c) largely stays intact; the workgroup removed subsection (7) because this is not an issue; they struck other language that the group felt did not apply to dissolution proceedings; they left in the term "intervener." 26(d) – they cleaned up some language for convenience of parties and witnesses because this always applies. Under 26(e), Supplementation of Responses, the workgroup took everything out and added language to simplify it.

Judge Davis asked if we needed to worry about the fact that information is known when there is no prejudice, but no one has bothered to respond or amend their response. He believes (c) says that if a party does not get a response amended, even though there is no prejudice, that party the will not be permitted to use it. Judge Nelson said that would be the situation if there are no lawyers involved. He said they had not changed that concept, and that is always a call from the bench. He stated that this was simple, concise and to the point.

Rule 33

Judge Nelson then moved on to Rule 33. On 33(a) the workgroup took out language that does not apply in a divorce case, and substituted "plaintiff" for "party," "respondent" for "defendant," and they eliminated third party language.

Under 33(b) the group struck 26(b).

Under 33(c), the workgroup made the language more specific. They wanted to make sure that the rule covers medical therapists, psychologists, etc. It was suggested that they strike "the parties' minor child or children" and add alternative language. The workgroup also added language that would result in the avoidance of parties exchanging releases in the courtroom.

Under 33.1, Uniform and Non-uniform Interrogatories, the workgroup struck the word "typewritten" from (e) (2). In (f), they struck redundant language and cited Rule 84. It was suggested that they change the language to say "and should serve as a guide only" instead of "and should be served as a guide only." Under (f) (2), they struck "the number only of." Under (3) (i) the change was made consistent with the current rule.

Rule 34

Under 34(a), the workgroup struck "phone records." It was suggested that they close the parenthesis after "photographs." They had also added "computer and computer hardware," but it was decided that "and other data compilations" covered that. The workgroup also struck 26(b) from "within the scope of Rule 26(b)."

Under 34(b), they substituted "petitioner" for "plaintiff." Under 34(c), they noted that "Rule 45" may need to be changed.

Rule 35

Under 35(a), they struck "including the blood group." It was suggested that they also include "DNA." There was discussion about a judge ordering an exam regarding the mental health of a party's abusive boyfriend/girlfriend/husband/wife. Judge Armstrong suggested a separate rule that allows the judges to order it, but also allows the person to object. He also suggested that we could craft a rule of joinder. It was also suggested to add, "Upon good cause shown, a court may order a mental or physical condition or where spousal maintenance is requested, a vocational rehabilitation expert." There was much discussion as to how to do this constitutionally. Judge Armstrong suggested that the workgroup draft something that allows the judges to do this. He said that there were two ways to do this: one is joinder, and the other is an OSC that gives them the right to be heard.

The workgroup also struck language regarding the person being examined having the right to have a representative present during the exam, and also have an audiotape of the exam. It was decided that the following be left in: "A mental or physical examination may be recorded by audiotape, unless such recording may adversely affect the outcome of the examination." Judge Armstrong also suggested adding "Upon good cause shown, the court may order that a physical or mental examination may be video recorded." Judge Nelson said they would add this.

Under 35(b), the workgroup inserted "the court's designated expert." It was decided to add "and any expert who refuses to make a report to the court, the court may exclude the testimony of that expert." "Any expert" also needed to be added to paragraph (3).

Rule 36

Under 36(a), Request to Admit, the group struck everything that pertains to request to admit, other than authenticity of documents. Judge Nelson said that authenticity of documents is usually always the issue. Bob said that he uses Request to Admit all the time. He voted not to take that out, because it is a valuable tool. Other members stated that they also use Request to Admit all the time. Judge Armstrong asked Judge Nelson to go back to square one on that.

Under 36(b), the workgroup limited them to ten requests to admit in place of twenty five. Under 36(c), the workgroup struck language that is difficult to put it into practice. It was suggested that in the first sentence, it should be changed to "Unless the court, for good cause shown, permits withdrawal or amendment of admission." The Committee agreed on this.

Form 7, Domestic Relations Interrogatories

Regarding Form 7, Domestic Relations Interrogatories, the workgroup cleaned up number 2. On question number 9, they modified it to make it a question for special needs children. They left in (f) (striking marital), and added "What are the extraordinary expenses associated with caring for this child?" 9 (a), (b) and (c) are totally deleted, and (d) and (e) would be moved under the domestic violence question.

Under Spousal Affidavits and Inventories, the group added "the attached" and struck "a." Judge Davis asked if we wanted to have a series of ten or twelve basic core questions about the parents' strengths or weaknesses, or issues, etc. that are critical in a custody evaluation. It was decided to add a custody section and a special needs section. Judge Davis suggested that they organize them into questions that were geared to custody, domestic violence, child support, spousal maintenance, property, debt, attorney's fees, etc. Judge Armstrong asked Judge Nelson to break them down into more defined areas, and Judge Nelson answered that he would work on that.

Bob was working on Rule 26.1. He concluded that this comes down to four areas: 1) the disclosure duty – how extensive is it going to be; 2) when is disclosure going to take place; 3) can you opt out of it if you want; and 4) is there a separate requirement for temporary and permanent orders and the continuing duty. He took out everything that did not apply to family law, and tailored the Duty to Disclose the Scope to the family law context. Most of it is self-explanatory. Subsection (a) (7) is totally new. Subpart (b) overlaps with interrogatories. Bob said that there was so much in here that he felt that the members needed to read it over and then discuss it at the next meeting.

Task: Bob will send the body of this document to Konnie electronically. The forms also need to be looked at.

There was much discussion about this rule. It was decided to add that unless somebody files a Notice of Application, this rule would not apply. Judge Armstrong stated that he felt that a Notice would have to be filed so many days after a responsive pleading in order to trigger this rule, or it is too late. There was discussion regarding a time frame to file the Notice of Application. It was decided that it would be a notice by 30 days after the responsive pleading was filed or otherwise by motion and order of the court upon good cause. Bob said he would add this.

c. Workgroup VI (Judge Warner, Chair)

Judge Warner's workgroup reviewed the current statutes that pertain to ADR and discussed what would be needed in this area for family law. The workgroup members were given assignments, and they will meet on February 23 telephonically. Judge Warner will draft a rule for petition for conciliation; Clarence Cramer and Nancy Eades will be working on rules where mediation is through the court; Judge Davis will work on rules regarding trying to get people to come to early resolution; Pam Liberty will look at rules regarding private mediation; Debra Tanner will be working on ADR IV-D cases; Annette Burns will look at rules regarding arbitration and open negotiation issues. They want to develop a set of rules that will be like a toolbox, to which litigants can go to help them with their cases. Diana Hegii will be used as a resource by this workgroup.

5. Next Meeting: Judge Armstrong

The next meeting will be held on March 15, 2004, 10:00 am – 3:00 pm, Arizona Courts Building, 1501 W. Washington, Conference Room 345. The conference call number is 602.542.9006.

6. Call to the Public

There were no public members in attendance.

7. Adjournment: Judge Armstrong

Judge Armstrong adjourned the meeting at 3:15 pm.